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D.W., Appellant)	
)	
and)	Docket No. 16-0945
)	Issued: July 27, 2016
DEPARTMENT OF VETERANS AFFAIRS,)	
IOWA CITY VETERANS MEDICAL CENTER,)	
Iowa City, IA, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

On April 4, 2016 appellant filed a timely appeal from a March 15, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 9, 2014, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.²

The issue is whether OWCP properly determined that appellant's request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

² With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On September 8, 2014 appellant, then a 59-year-old locksmith, filed an occupational disease claim (Form CA-2), alleging that he developed pain and tenderness in his bilateral elbows from repetitive motion of his wrists in the performance of duty. He first became aware of his condition on April 1, 2014 and realized it was causally related to his employment on June 1, 2014. Appellant did not stop work.

By letter dated October 14, 2014, OWCP advised appellant of the type of evidence needed to establish his claim. It particularly requested that he submit a physician's reasoned opinion addressing the relationship between his claimed condition and specific employment factors.

Appellant was treated by Dr. Mack H. Longmire, Board-certified in emergency medicine, on July 12, 2013 for left elbow pain. Dr. Longmire noted that appellant presented on October 4, 2013 with persistent right elbow pain. Appellant stated that he was unable to get an appointment to see an orthopedist so he went to the emergency room for a steroid injection of the right lateral epicondyle. He reported working as a locksmith and frequently using a screwdriver which exacerbated his elbow pain. Dr. Longmire noted findings of tenderness of the right lateral epicondyle and pain with pronation against resistance. He diagnosed right lateral epicondylitis. Dr. Longmire injected the lateral epicondyle with a steroid and appellant experienced significant symptomatic improvement. An x-ray of the left elbow dated July 12, 2013 was normal.

Appellant was treated by Dr. Luke M. Gabe, a critical care specialist, on October 1, 2013, for right elbow pain. He noted being diagnosed with left lateral epicondylitis during the past summer and his physician provided a steroid injection which resolved his elbow condition. Appellant reported frequently performing manual labor at his farm but he did not perform aggravating movements at work. Dr. Gabe diagnosed lateral epicondylitis and fatigue and prescribed a forearm brace.

Appellant submitted nurse's notes from October 4, 2013 to August 29, 2014, where he was treated for right elbow pain. He noted being diagnosed with left-sided tennis elbow and had a steroid injection that improved his symptoms.

Appellant was treated by Dr. Dan Tong, a resident, on June 1, 2014, presenting with a sixth-month history of right elbow pain with an onset of left elbow pain three weeks later. He received injections bilaterally with an initial decrease in pain but his symptoms gradually returned. Appellant noted working as a locksmith with repetitive upper extremity movements as part of his job. He was prescribed forearm bands. Appellant was seen for physical therapy due to the acute chronic lateral epicondylitis. He submitted physical therapy notes from May 29 to July 2, 2014, where he underwent therapeutic exercises to improve his symptoms of left lateral epicondylitis.

Appellant was treated by Dr. Katherine M. White, a Board-certified internist, on August 29, 2014, for a routine follow-up. He reported his back pain was improved and his depression was well controlled. Appellant noted undergoing physical therapy during the past summer for left lateral epicondylitis. He reported doing a home exercise program with

improvement in symptoms. Dr. White diagnosed low back pain, hypertension, post-traumatic stress disorder, depression, fatigue and lateral epicondylitis.

Appellant also submitted a position description for a locksmith dated October 15, 2003. He also submitted an OWCP questionnaire dated November 7, 2014, and indicated that his bilateral elbow condition was caused by repeatedly turning a screwdriver with both hands while performing his locksmith duties. Appellant denied participating in sports.

The employing establishment submitted a statement dated October 28, 2014 from appellant's supervisor, Jessica Beswick. Ms. Beswick indicated that the employing establishment had no reason to refute appellant's claim. She noted his tasks require a wide range of physical exertion using fine motor skills, lifting up to 50 pounds, and repetitive twisting motion using a screwdriver. Ms. Beswick indicated that when appellant's injury was diagnosed several precautions were put into place to minimize the effects of the activities that were believed to be aggravating his injury.

In a decision dated December 9, 2014, OWCP denied appellant's claim as the medical evidence of record did not support that he had a medical condition causally related to the accepted factors of his employment.

In an appeal form dated December 7, 2015, and received on December 15, 2015, appellant requested reconsideration. He asserted in a supporting statement that numerous times throughout his treatment history the healthcare providers opined that his work as a locksmith entailed turning a screwdriver and continued pronation and supination of the wrist which caused tennis elbow. Appellant indicated that the fact that he cared for land was immaterial and noted he has been a farmer since 2004 and never had elbow pain prior to 2012 when he became a locksmith. He indicated that his position as a locksmith required an extreme amount of physical work, especially turning a screwdriver. Appellant referenced reports from Dr. Tong dated May 29, 2014 and Dr. Longmire dated October 4, 2013 who indicated that repetitive upper extremity movements performed as part of his job including frequently using a screwdriver exacerbated his elbow pain. Appellant submitted other items all previously of record. He submitted a schedule F from his 2004 federal tax return which addressed profit or loss from farming. Appellant wrote on the tax return "Disputes 'farming' as cause."

By decision dated March 15, 2016, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of

³ 5 U.S.C. § 8128(a); Y.S., Docket No. 08-440 (issued March 16, 2009).

OWCP's decision for which review is sought.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁶

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,⁷ is positive, precise, and explicit, and manifests on its face that OWCP committed an error.⁸ The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. As noted, an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ As appellant's request for reconsideration was not received by OWCP until December 15, 2015, more than one year after issuance of the last merit decision by OWCP on December 9, 2014, it was untimely. Consequently, he must demonstrate clear evidence of error by OWCP denying his claim for compensation.

The Board finds that appellant has not demonstrated clear evidence of error. In his December 7, 2015 reconsideration request, appellant disagreed with OWCP's decision denying his claim for compensation. He asserted that he submitted sufficient medical evidence to

⁴ 20 C.F.R. § 10.607(a).

⁵ *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *M.L.*, Docket No. 09-956 (issued April 15, 2010). See also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term "clear evidence of error" is intended to represent a difficult standard).

⁷ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

¹⁰ 20 C.F.R. § 10.607(a).

establish a causal relationship between his work duties and bilateral epicondylitis. Appellant indicated that numerous times throughout his treatment history the healthcare providers noted that his work as a locksmith entailed turning a screwdriver and the continued pronation and supination of the wrist which caused tennis elbow. He indicated that the fact that he cared for land was immaterial and noted he has been a farmer since 2004 and never had elbow pain prior to 2012 when he became a locksmith. Appellant referenced reports from Dr. Tong dated May 29, 2014 and Dr. Longmire dated October 4, 2013, who indicated that appellant performed repetitive upper extremity movements as part of his job and frequently used a screwdriver which exacerbated his elbow pain. The Board notes that while appellant addressed his disagreement with OWCP's decision denying his claim for an occupational disease, his general contentions do not demonstrate clear evidence of error as they do not raise a substantial question as to the correctness of OWCP's most recent merit decision which denied appellant's claim for an occupational disease.

The Board notes that the underlying issue is medical in nature. The Board notes that clear evidence of error is intended to represent a difficult standard. The submission of a detailed well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹

Appellant submitted a position description for a locksmith dated October 15, 2003, a report from Dr. Longmire dated October 4, 2013, a report from Dr. Tong dated June 1, 2014 and physical therapy notes from May 29 to July 2, 2014. OWCP had previously considered this evidence and appellant, in submitting these documents, did not explain how this evidence was positive, precise, and explicit in manifesting on its face that OWCP committed an error in denying his claim for compensation. Thus, these reports are insufficient to discharge appellant's burden of proof, as their resubmission is insufficient to raise a substantial question as to the correctness of OWCP's decision.

Appellant submitted a schedule F from his 2004 federal tax return which addressed profit or loss from farming. He stated on the return "Disputes 'farming' as cause." However, this evidence is insufficient to demonstrate clear evidence of error as it does not address the underlying issue in this case, whether appellant's bilateral elbow condition was causally related to his employment as a locksmith.

The Board finds that OWCP properly found that appellant's December 7, 2015 request for reconsideration failed to demonstrate clear evidence of error. It therefore properly denied appellant's reconsideration request.

On appeal, appellant reiterates assertions that he made before OWCP indicating that although he did not file a timely reconsideration request he had submitted sufficient medical evidence to establish that his bilateral elbow condition was related to his work as a locksmith. However, as noted, the Board does not have jurisdiction over the merits of the claim. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's decision for which review is sought.

¹¹ *D.G.*, 59 ECAB 455 (2008).

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board